No. 80-791

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARTIN BLITSTEIN,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Tenth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Petitioner presented a prima facie case of prosecutorial vindictiveness against a criminal defense lawyer which the prosecution should have been required to rebut.

II. Whether the Petitioner should have been allowed to present other instances of prosecutorial vindictiveness against criminal defense lawyers in order to buttress his claim of prosecutorial vindictiveness and misconduct.

III. Whether the Petitioner presented a prima facie case of prosecutorial misconduct which the prosecution should have been required to rebut.

IV. Whether the Petitioner was entitled to jury instructions regarding the legitimacy of fee-negotiations between a criminal defense lawyer and his client.

V. Whether the Petitioner could validly be convicted of interstate travel under 18 U.S.C. 1952 to commit extortion under 18 U.S.C. 875 by evidence which only alleged fraudulent statements by Petitioner coupled with a threat posed by government or bodies with which the Petitioner had no connection or control.

VI. Whether the offense charged in the indictment, to wit: interstate travel under 18 U.S.C. 1952 to commit extortion under 18 U.S.C. 875, is an actual offense cognizable and punishable under federal law.

VII. Whether the evidence introduced at trial and the District Court's charge to the jury amounted to a variance from the offense charged in the indictment, to wit: interstate travel under 18 U.S.C. 1952 to commit extortion under 18 U.S.C. 875.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

MARTIN BLITSTEIN,
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versus

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On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Tenth Circuit

PETITION FOR CERTIORARI

The Petitioner, MARTIN BLITSTEIN, respectfully prays a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on July 14, 1980.

CITATIONS TO OPINIONS BELOW

The United States District Court for the District of Colorado entered a judgment of conviction of this Petitioner on November 30, 1978, as to two counts, (1) wire fraud, (18 U.S.C. 1343); and (2) interstate travel (18 U.S.C. 1952) to commit extortion (18 U.S.C. 875). This conviction was made the subject of an appeal to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit affirmed this conviction on July 14, 1980, in a slip opinion which has not yet been reported, entitled: *United States v. Blitstein*, No. 78-2037 (July 14, 1980). This opinion is reproduced herein as Appendix A. The Petitioner thereupon filed a *Petition for Rehearing and Suggestion for Rehearing En Banc* which was denied by the Tenth Circuit on September 17, 1980. This order denying rehearing is reproduced herein as Appendix B.

JURISDICTION

The judgment of the United States District Court was affirmed by the United States Court of Appeals. The *Petitioner's Petition for Rehearing* was denied on September 17, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 22.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution, Amendment VI reads in pertinent part: "In all criminal prosecutions,

the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

2. 18 U.S.C. 1343 reads in pertinent part: "Whosoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, . . . communication in interstate . . . commerce, . . . for the purpose of executing such scheme or artifice. . . ."

3. 18 U.S.C. 1952 reads in pertinent part: "(a) Whoever travels in interstate . . . commerce . . . with intent to . . . otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, . . . as used in this section 'unlawful activity' means . . . extortion, in violation of the laws of the State in which committed or of the United States . . . in interstate commerce any communication containing any demand or request for a ransom or reward for the release of any kidnapped person, . . . (b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another . . . (c) Whoever transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another . . . (d) Whoever, with intent to extort from any person, firm, association, or

corporation, any money or other thing of value, transmits in interstate commerce any communsication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime. . ." (See Appendix C)

4. 18 U.S.C. 875 reads in pertinent part: "(a) Whoever transmits in interstate commerce any communication containing any demand or request for a ransom or reward for the release of any kidnapped person, . . . (b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, . . . (c) Whoever transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, . . . (d) Whoever, with intent to extort from any person, . . . any money, . . ., transmits in interstate commerce any communication containing any threat to injure the property or reputation of the addressee or of another . . . or any threat to accuse the addressee or any other person of a crime, . . ." (See Appendix D)

STATEMENT OF THE CASE

A. *Introduction.* The Petitioner was a criminal defense lawyer based in Miami, Florida and a member of the Florida Bar before his conviction in this cause, (RX

584-585). The Petitioner maintained a second residence in Vail, Colorado and decided to utilize a phone line in that residence for legal practice in Colorado.

B. *The Mortensen Case.* The Petitioner entered his first federal case in the District of Colorado in June of 1978, *United States v. Mortensen,* Cause No. 78-CR-109 (Judge Finesilver). From June 26th to June 29th, 1978, the Petitioner conducted an extensive and hotly contested suppression hearing against Asst. U.S. Attorney Nancy Rice. Prosecutor Rice then began an investigation into the factual allegations contained in a *Motion for Continuance* filed by Petitioner in the *Mortensen* case, (RIX 425). On June 30, 1978, Asst. U.S. Attorneys Nancy Rice and Rod Snow filed a *Motion for Issuance of the Rule to Show Cause* why the Petitioner should not be held in contempt as to factual statements in the *Motion for Continuance* filed in the *Mortensen* case, (see RI 63, et seq). The United States Attorney himself characterized this *Motion,* coming as it did during a criminal trial, as unprecedented in his "practice of law," (RIX 422-423). The presiding judge, Judge Finesilver, refused to hear the *Motion,* (RIX 429); therefore, Prosecutors Snow and Rice brought it before another district judge. Judge Winner heard the *Motion* from July 18th to 19th and discharged the Petitioner, (RIX 431). According to United States Attorney Dolan, Prosecutor Rice was "very unhappy" with the result, (RIX 434). As a result of this unprecedented motion during the pendency of his trial, Dr. Mortensen moved for dismissal on the grounds of governmental misconduct in seeking to in-

timidate his counsel, the Petitioner. Presiding Judge Finesilver denied this *Motion;* however, he ordered that "someone of senior experience" sit with Miss Rice throughout the *Mortensen* trial, (RIX 446). In the *Mortensen* trial First Assistant Stuckey sat with Miss Rice, (RIX 446). During that trial, the Petitioner objected to a question from Miss Rice on the grounds that she was misrepresenting the evidence, (RIX 446-447). Following this objection, First Assistant Stuckey threatened the Petitioner to the effect that if he continued in that vein, that the Petitioner was going to be taken "to the mat hard," (RIX 418); and that the remark was not a threat, but a "promise," (RIX 449). The *Mortensen* cause ended with an acquittal, and Miss Rice's opinion that the Petitioner "ought not to be practicing, etcetera" circulated in the United States Attorney's office, (RIX 443).

C. *The Investigation and Indictment of the Petitioner.* On September 9, 1978, Clifford T. DeYoung, an actor, was detained at Stapleton Airport, Denver, Colorado after an airport search had revealed 97 milligrams of cocaine, (RII 3-4; RX 516-518, 547, 550). On September 18th, 1978, Mr. DeYoung contacted the United States Attorney's office in Denver, Colorado through an intermediary, (RIX 464), and the matter was referred to Miss Rice, (RIX 469). Later, Miss Rice set up an interview between Mr. DeYoung and his attorney Mr. Dowling, (RIX 472-473, 478).[1] At that time, Assistant

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1 Further testimony revealed that the usual course of business would have been to refer this initial interview to the appropriate agency. (RIX 474)

United States Attorney Munsinger admitted that he and Miss Rice knew that the matter involved the Petitioner, (RIX 471) and that he knew the feeling of Miss Rice toward the Petitioner, (RIX 471-472). However, Miss Rice was permitted to be present at the interview, (RIX 472), and even participated, (RIX 473). Mr. DeYoung and Mr. Dowling related to Prosecutors Rice and Munsinger that:

> A. . . . Mr. DeYoung had been found with a very minute amount of cocaine, yet Mr. DeYoung I think denied or said he didn't know of this, of it, and then at some point shortly thereafter Mr. DeYoung was put into contact with Mr. Blitstein and that Mr. Blitstein had — and I think Miss Pease at various times had in effect — well, not in effect — had attempted to get a large sum of money from Mr. DeYoung to represent him in a case which they said was pending in a matter, something about an arrest warrant which had been issued, according to the representation Mr. DeYoung and Blitstein had made to them, and that Mr. DeYoung had paid some money and that apparently there was no case . . .
>
> (RIX 461)

In spite of her known and vehement feelings against the Petitioner, Miss Rice was assigned investigative duties to verify the surrounding facts of the search and

the case in general, (RIX 482-483). On October 2nd, 1978, Mr. DeYoung was issued a letter of no prosecution on the cocaine charge from the United States Attorney, (RIV 62). On October 2nd, 1978, Prosecutor Munsinger called Mr. Thomas Casey at the Denver District Attorney's office and during this "initial call, (RIX 486), he advised Mr. Casey that Mr. DeYoung would be a witness for the government before a federal grand jury, (RIX 485-486). At that time, the DeYoung matter had not been presented to the District Attorney's office, (RIX 488; RVIII 278). Subsequently, Mr. Casey called Detective Costigan assigned to the airport, discussed the case, (RVIII 278), and "advised him that [he] would not accept the [DeYoung] case for filing," (RVIII 279-280).

On October 3, 1978, a five count indictment was presented by Munsinger to a federal grand jury, (RI 1-5). Prior to this, the United States Attorney's office did not interview the Petitioner nor request that he be interviewed, (RIX 463, 473-474). The United States Attorney's office did not inform the Petitioner of his "target" status nor permit him to testify before the grand jury.[2] Accordingly, the Petitioner and his paralegal assistant were indicted on October 3, 1978, (RI 1). On October 5, 1978, Mr. DeYoung was issued a letter of no

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2 These procedures were contrary to Section 9-11.253 of Title 9 *United States Attorney's Manual* (memo of December 16, 1977 and August 7, 1978 updating USAM 9-11.000) Criminal Division United States Department of Justice; see also 22 CRIMINAL LAW REPORTER 2423 (Feb. 15, 1978) at 2424.

prosecution from the Denver District Attorney's office.

D. *The Legal Proceedings Before and During Trial.* The Petitioner was arrested on October 18, 1978, in Florida under a warrant, and was arraigned on October 23rd, 1978, (RI 158). The Petitioner filed a lengthy *Motion for a Bill of Particulars* to require the government to spell out exactly what the Petitioner was charged with in the indictment and how the government intended to prove it, (RI 6, et seq). The Petitioner also filed a lengthy Motion to *Dismiss Indictment Based Upon Prosecutorial Misconduct* supported by exhibits and documents demonstrating the previously related facts, (RI 51-98). The Court denied both Motions without requiring the government to reply or conducting an evidentiary hearing, (RI 158-159). During trial, the Court agreed to hear some evidence regarding prosecutorial vindictiveness and misconduct, (RIX 410, et seq); but refused to hear other evidence, (RIX 401, et seq). Later, the Court denied the *Motion* again saying that the Petitioner had made "no showing" of "any vindictiveness" on the part of the government, (RXI 893).

The Petitioner began trial on November 21, 1978 less than 30 days after arraignment, (RI 158-159). Following the trial testimony, the Petitioner requested two jury instructions, (nos. 34 and 53), relating to the legitimate practice of law, (Sup. RI 3, 6); however, the Court refused to give them, (Sup. RI 3, 6), and the Petitioner specifically objected to their omission, (RXI 899, 901).

E. *The Testimony at Trial.* At trial Mr. DeYoung testified that the cocaine was his, (RIV 20-21, 26); that he knew it was cocaine, (RIV 20-21, 26) but that he did not consent to the search which uncovered it, (RIV 9-10).[3] Mr. DeYoung was released from custody because a field test kit was unavailable, but was informed that he would be contacted if the substance seized tested out as a controlled substance, (RII 3-4). Mr. DeYoung returned to California where his theatrical lawyer, Skip Brietenham recommended the Petitioner, (RII 4-5). On September 13, 1978, Mr. DeYoung called the Petitioner's Vail, Colorado telephone number and the Defendant later returned his call, (RII 5), telling Mr. DeYoung that he would check on DeYoung's case and call him back. On September 14, 1978, Mr. DeYoung called the Petitioner and was told by him that the test was positive[4] and to send him a $5,000 retainer which DeYoung did, (RII 7-8). Later, on the 14th, the Petitioner and his paralegal assistant, Kim Pease traveled to California and met with DeYoung, (RII 11-12). According to DeYoung, the Petitioner quoted him a fee of $25,000 while stating that $50,000 was his regular fee, (RII 11). The Petitioner and DeYoung discussed various legal defenses including suppression, (RII 13-16); and the Petitioner informed him that he, DeYoung, was facing

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3 The testimony of the officers who actually performed the search was that DeYoung did "consent," (RX 518, 531).

4 The government's own testimony revealed that the substance was indeed cocaine, that Mr. DeYoung was knowledgeable about that fact, (RIV 26), and that the substance had indeed tested out positive on September 13th, 1978, (RVII 164, 172-173).

up to "fifteen years" and that Colorado law did not really distinguish between possession and sale.[5]

On the 16th of September, DeYoung agreed to make partial payments on the fee in the form of two checks totaling $10,000, (RII 18-19). On the 17th, Mr. DeYoung called Michael Dowling, his Colorado attorney, and David Davis, a California attorney who was his cousin, (RI 22-23). Pursuant to their advice, DeYoung stopped payment on the checks, (RII 23). DeYoung was then called by the Petitioner who asked him to reinstate the checks so that the Petitioner would defend him, (RII 26-27). According to DeYoung, the Petitioner told him that he was going to be arrested, (RII 27-28), and that the arrest could happen at the airport or that he would be arrested in California and conveyed back to Colorado "in chains," (RII 27-29).[6] Mr. DeYoung requested that the Petitioner call his cousin, Mr. Davis,

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5 The trial Judge took judicial knowledge that simple possession of cocaine, "COLO. STAT. REV. §12-22-302," (RXII 931) is punishable in Colorado as follows:

> This is Section 2(b) of 12-22-322: "Except as provided in certain other sections, whoever violates 12-22-302," and I have read a portion of that to you, "is guilty of a felony, and upon conviction thereof shall be punished by a fine of not more than $10,000 or by imprisonment in the State Penitentiary for not less than two nor more than 15 years." (RXII 932)

The Colorado Statute proscribing sale has a similar penalty range of 10-20 years, (RXII 933).

6 Testimony from the government's own witnesses revealed the well known fact that interstate prisoners were indeed transported in "some form of chains," (RVII 214-215).

(RII 28). According to Mr. Davis, he chastised the Petitioner for intimidating his cousin, Mr. DeYoung, (RV 23), whereupon the Petitioner told him that "time was of the essence," and that his cousin "would be arrested,"[7] (RV 27). Mr. Davis specifically asked the Petitioner who was threatening to have DeYoung arrested himself, and Petitioner flatly denied that was his meaning, (RV 27). The government rested its case on extortion and fraud on the theories that: (1) the Petitioner had falsely and extortionately predicted DeYoung's arrest and his transportation back to Colorado "in chains" (a) because of the de minimus amount of drugs involved;[8] and (b) because the search was bad;[9] (3) that the Petitioner charged fees which were too high; (4) that the Petitioner falsely and extortionately told DeYoung's cousin that DeYoung was going to be arrested.

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7 The government's own witnesses testified that if the test proved positive as it had, (RVII 164, 172-173), that Mr. DeYoung "probably will" be arrested, (RIII 14).

8 Expert witness testimony established that 97 milligrams of cocaine was a "usable" amount, in fact, four doses, (RXI 758-759). Colorado cases have sanctioned prosecution of even a "minute amount," see *Casias v. People*, 415 P.2d 344, 347 (Colo. 1966) decision upholding a conviction as to the "whitish residue" in a hypodermic needle; *Duran v. People*, 360 P.2d 132 (Colo. 1961) where the Colorado Supreme Court sitting en banc upheld a marijuana conviction of some "50 milligrams," *Zamora v. People*, 487 P.2d 1116, 1118 (Colo. 1971) where another en banc Court upheld conviction for a "trace" in a pipe; see also *Fagin v. People*, 484 P.2d 1216, 1217 (Colo. 1970) etcetera.

9 See note 3, *Supra*.

F. *The Conclusion of the Trial.* The Trial Court granted a judgment of acquittal as to Counts III and IV of the indictment, (RI 119). The jury acquitted Petitioner of Count I, (RI 113, 115); convicted Petitioner of Count II and Count V, and acquitted codefendant Kim Pease of all counts, (KI 113). The Petitioner was sentenced to two years imprisonment, with eighteen months suspended and six months to serve as to each count served concurrently and a $1,000 fine as to Count II and a $2,-000 fine as to Count V paid cumulatively, (RI 150).

6. *The Tenth Circuit's Opinion.* The Tenth Circuit's Opinion in *United States v. Blitstein,* No. 78-2037 (July 14, 1980) is of little help in deciding the issues presented herein. Factually, the panel did not point to any specific extortionate act nor discuss extortion in theory or in law, *Opinion,* pp. 1-26. As to fraud, the situation is similar, *Opinion,* pp. 1-26. As for Petitioner's claim of vindictive prosecution, the Tenth Circuit held:

> We are not impressed by Blitstein's effort to present himself as the "target" for selective and vindictive prosecution because of his previous "entanglements" with the office of the United States Attorney. . . .
>
> (*Opinion* at 18)

And as to the Petitioner's claim of prosecutorial misconduct, the Court held:

> There is nothing in this record evidencing prosecutorial misconduct.
>
> (*Opinion* at 24)

As for most of the issues presented herein, the Court simply held:

> We have carefully considered each of the remaining allegations of error advanced by Blitstein and hold that they are, individually and cumulatively, without merit.
>
> (*Opinion* at 22-23)

and:

> The remaining issues raised by Blitstein which have not been specially addressed or discussed have been considered. We hold that they are legally insubstantial.
>
> (*Opinion* at 25)

Indeed, the *Opinion* of the Tenth Circuit carries the tone of a rather intemperate polemic against the Petitioner, so much so that one member of the panel disassociates himself from the tenor of the *Opinion*, though not its result, (see Doule, Circuit Judge, specially concurring, *Opinion*, at 26).

REASONS WHY THE WRIT SHOULD BE GRANTED

I

Whether The Petitioner Presented A Prima Facie Case Of Prosecutorial Vindictiveness Against A Criminal Defense Lawyer Which The Prosecution Should Have Been Required To Rebut.

A. *The Issue as Raised Below.*

The Petitioner filed his *Motion to Dismiss Indictment Based on Prosecutorial Misconduct,* which alleged among other things that the "instant prosecution was prompted by and motivated by prosecutorial vindictiveness and reprisal," (RI 51). The Petitioner raised this issue upon appeal as Point of Error III, . . . "prosecutorial misconduct and vindictiveness," *Appellant's Brief in Chief,* p. 13; and Petitioner reurged this point in his *Petition for Rehearing,* pp. 6-7.

B. *The Prima Facie Case Presented Before and During Trial.*

In order to show that his prosecution was the result of prosecutorial vindictiveness, the Petitioner presented the following facts in his *Motion,* (RI 51-98), and during trial:

1. That the Assistant United States Attorney Nancy Rice had previously engaged in prosecutorial vindictiveness by (a) seeking to hold Petitioner in con-

tempt during the pendency of criminal proceedings against his client, (RI 63, et seq); (b) by taking her *Motion* to another judge when the presiding judge refused to hear it, (RIX 429).

2. That Miss Rice was "very unhappy" with the unsuccessful attempt to place Petitioner in contempt, (RIX 434); and that Miss Rice aired her opinion that the Petitioner should "not be practicing" law in the United States Attorney's office, (RIX 443).

3. That after Petitioner filed a *Motion to Dismiss* in the *Mortensen* case, the presiding judge further embarrassed Miss Rice by requiring one of her superiors to sit with her during the remainder of the *Mortensen* trial which ended in acquittal, (RIX 446).

4. That during the *Mortensen* trial First Assistant Stuckey who was sitting with Miss Rice and who was the ranking criminal branch assistant, threatened the Petitioner with being "brought to the mat, hard," (RIX 418).

5. That this policy of threatening criminal defense lawyers who vigorously defended "guilty" clients with imprisonment or prosecution themselves was not limited to Petitioner, (RIX 401-410).[10]

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10 Proof along this line was refused on the grounds that it was irrelevant to the "particular charge of motion before the Court," (RIX 406).

6. That the first contact as to the DeYoung matter was referred to Miss Rice, (RIX 469).

7. That the United States Attorney's office avoided its usual mode of procedure and instead of referring the initial interview to the appropriate federal agency, conducted the initial interview itself, (RIX 474).

8. That even though the United States Attorney's office knew that the Petitioner was involved, knew that Miss Rice detested the Petitioner, and knew that Miss Rice had previously exhibited her animosity through her unprecedented attempt to see that Petitioner was held in contempt, she was present and allowed to participate in the initial interview, (RIX 472-473), and to conduct the first stages of the investigation, (RIX 482-483).

9. The Petitioner was not interviewed nor did the United States Attorney notify him of his target status nor allow him an opportunity to testify as set forth in the guidelines set down in the United States Attorney's Manual, Title 9.[11]

10. The United States Attorney's office informed the District Attorney's office that DeYoung would be a government witness, (RIX 485-486), before the DeYoung case was presented to the Denver District Attorney's office, (RIX 488; RVIII 278), and according-

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11 See note 2, *Supra*.

ly, the Denver District Attorney's office declined the DeYoung case on the same day, (RVIII 279-280).

11. That the government's case was presented to the federal grand jury and then later to petit jury on the theory and fact that the cocaine case against DeYoung was not viable because of the "bad" search and because it was not a "usable" amount, (RVIII 285-286), when (1) the United States had actual and constructive knowledge that the search was a consent search, (RVII 537); and that the amount of contraband, 97 milligrams, 83% pure was a usable amount; (RXI 758-759); and when (2) the United States itself had successfully prosecuted consent searches and amounts similar to the DeYoung case.[12]

12. That the contempt action followed by this prosecution was unprecedented, (RI 53; RIX 422-423).

C. *The Response of the Lower Courts.*

The Trial Court viewed this evidence which was produced almost wholly through the testimony of government witnesses and the testimony of the Assistant United States Attorneys themselves as "no showing" of any "vindictiveness" on the part of the government, (RXI 893). The Court denied the actual *Motion* and

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12 Compare 80 milligrams of pure substance (RX 552) to 35 milligrams of pure substance, *United States v. Jeffers*, 524 F.2d 253 (7th Cir. 1975); see also *United States v. Sudduth*, 458 F.2d 1222 (10th Cir. 1972); also the consent search in *United States v. Seely*, 570 F.2d 322 (10th Cir. 1978).

proffered exhibits, (RI 51, et seq), and did so without government response on an evidentiary hearing, (see RI 158-159). Later, during trial, the Court permitted a portion of the defense testimony concerning this issue, (RIX 410, et seq), and continued to deny the *Motion*. The Court of Appeals, likewise found that the above uncontested facts constituted "nothing . . . evidencing prosecutorial misconduct," *United States v. Blitstein, Slip Opinion*, p. 24.

D. *Reasons Why the Writ Should be Granted.*

The Petitioner argues that the twelve (12) points above, (see I, B, *Supra*) constitute a prima facie showing of prosecutorial misconduct in regard to the Petitioner's prosecution. This misconduct is actually a combination of the prosecutorial vindictiveness[13] proscribed by this Court in *Blackledge v. Perry*, 417 U.S. 21 (1974); and the selective prosecution[14] proscribed by the United States Court of Appeals for the Seventh Circuit in *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973). Here the government was able to punish a criminal defense lawyer through prosecution for his vigorous defense of a criminal client in the *Mortensen* case which was that client's right under the Sixth Amendment to the United States Constitution. The claim of vindictiveness is further buttressed by the fact that this prosecution was the second attempt at intimidation, the first being an

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13 Point III, *Appellant's Brief in Chief*, at 13, 25-38.

14 Point II, *Appellant's Brief in Chief*, at 13, 25-38.

unprecedented contempt effort brought by the same Assistant before a non-presiding judge in the *Mortensen* case. The other surrounding circumstances, also uncontroverted, presented an even darker picture. The Petitioner argues that his twelve (12) points met the threshold test of *Blackledge*, "vindictiveness" tending to deter the exercise of constitutional rights, (*Blackledge, Supra*, at 28); however, the Court failed to even require the government to respond. Likewise, the twelve points described above presented a prima facie case of selective prosecution under *Falk* which should have required the government to go forward and rebut, *Falk, Supra*, at 623-624.

The central issue is whether the government should be able to single out and prosecute a criminal defense attorney under the extraordinary circumstances presented here without more judicial supervision and review than was received in this case. The defense bar was lately awakened to the not so subtle intimidations poised by such prosecutions and attempts to prosecute and have begun studies of the form and the frequency of this category of government misconduct.[15] The dangers poised by such activities on the part of the government cannot be overstated. The very hallmark

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15 See Category "D. Harrassment of targeted individuals," specifically "1. defense attorneys" whose clients are used against them in return for leniency in political prosecutions, Maloney, *Report on Prosecutorial Misconduct, Natl. Assoc. of Criminal Defense Lawyers, (August 23, 1980)*, 10 VOICE FOR THE DEFENSE 7, 8-10 (Aug/Sept. 1980).

of the adversary system utilized by our criminal system is a vigorous and vocal criminal defense bar willing to combat the vastly larger legions of government in blow for blow contests. One who says that the possible loss of liberty, fortune, and a career, as this Petitioner suffered, would not deter these brave warriors in the least, knows little about human nature. Indeed, there are some among us who have no relish for martyrdom. Indictment itself, even coupled with a possible acquittal, would be a sufficient chill to some of our fellows who fear loss of reputation and practice.

On the other hand, if criminal defense lawyers had the power to indict prosecutors under similar circumstances and without judicial supervision (and on the same reliable testimony, i.e., "criminal clients"), could the prosecutorial branch properly carry its burden in the adversary system? Considering its unprotected position, the criminal defense bar must be shielded from the intimidations which this court must recognize would hamper even the government. And the criminal defense bar must be protected by the courts because there is no one else to protect them. Unlike the prosecution, the defense bar has no constituency save perhaps their criminal clients, a sizeable portion of whom do not have the right to vote. The criminal defense bar is not and has never been held in high esteem by the general public or even by the legal profession. Indeed, they are considered somewhat like a dog in the manger. However, if the adversary works like we are told it works, then that animal must remain in the

manger and must remain vocal. This Court once promised:

> But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever.
>
> (*Sacher v. United States*, 343 U.S. 1 [1952] at 13)

The Petitioner would simply ask this Court to recall that promise, to recall the reasons for which it was made, and to ask itself if the matters involved here do not involve those reasons.

II

Whether The Petitioner Should Have Been Allowed To Present Other Instances Of Prosecutorial Vindictiveness Against Criminal Defense Lawyers In Order To Buttress His Claim Of Prosecutorial Vindictiveness And Misconduct.

For these same reasons, the Petitioner argues that he should have been allowed to present evidence: that a policy of intimidation of defense counsel by threats of prosecution had been implemented by the United

States Attorney's office for the District of Colorado, (RIX 401, et seq). Refusal of the District Court upon objection by the government to permit the Petitioner to present any evidence beyond his individual case (RIX 401), hampered him in the presentation of evidence of prosecutorial misconduct, specifically, "vindictive prosecution," *Blackledge, Supra,* and "selective prosecution," *Falk, Supra.* This limitation runs afoul of clear holdings by this Court,[16] and the courts of appeal.[17]

III

Whether The Petitioner Presented A Prima Facie Case Of Prosecutorial Misconduct Which The Prosecution Should Have Been Required To Rebut.

The Petitioner advances this point[18] because (1) the government misconduct here went beyond mere prosecution and continued throughout trial; and (2) the sui genesis nature of this issue has made this Petitioner fearful of mislabeling the misconduct, which should perhaps be characterized as "prosecutorial misconduct tending to impair the integrity of the adversary system." However, the Petitioner would point out that the misconduct continued past the point of prosecution

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16 *Wick Wo v. Hopkins,* 118 U.S. 356, 373 (1886).

17 *Falk,* supra, at 621; *United States v. Steele,* 461 F.2d 1148 (9th Cir. 1972).

18 Raised as Point II and III, *Appellant's Brief in Chief,* at 25-38.

through trial. Specifically, the government continued to argue that the DeYoung prosecution was not viable because of the minimal amount, and the "bad" search even after it learned that this was not the case. For example, the government continued to argue and present testimony that the search was bad after its interviews of the officers who actually searched DeYoung, (RX 536-537), revealed that it was a consent search, (RX 517-518, 531); and the government sought to prevent this exculpatory testimony of consent being available to the defense or the jury at trial by excusing the witness before trial, (RX 537), and continuing to argue that the search was questionable.

IV

Whether The Petitioner Was Entitled To Jury Instructions Regarding The Legitimacy Of Fee-Negotiations Between A Criminal Defense Lawyer And His Client.

A. *The Issue As Raised Below.*

Prior to the charge below, the Appellant requested the following jury instructions dealing with the profession of law:

LEGITIMATE ACTIVITIES
NOT RESTRAINED

The statute under which the charges are based has no reference or bearing on action by

> an attorney, honorestly [sic] acting and representing clients. It has reference to and bears on interference with interstate commerce by the compulsory payment of money extorted by a person for his own individual benefit.
>
> (Sup RI 3)

> You are instructed that with respect to the charges contained in the indictment, the specific amount of attorney fees either charged or received is not relevant.
>
> (Sup RI 6)

The Court denied these requests, (Sup RI 3, 6), and thereafter, Petitioner's trial counsel specifically objected to failure to include these charges in the Court's charge, (RXI 899, 901). Failure to give these charges was raised as Point of Error VI, . . . "the refusal to instruct the jury on the theory of the defense," *Appellant's Brief in Chief*, p. 15; and was reurged in Petitioner's *Petition for Rehearing*, p. 10.

B. *Reasons for Granting the Writ.*

1. *The Central Issue.* The central issue here is whether the courts should recognize that there are legitimate activities in which a criminal defense lawyer may properly rely on fear in charging a fee in a criminal case. All authorities in this field caution a criminal attorney that one of his duties is to appraise the client

of the possible legal consequences of his deed.[19] Several scholarly works on the practical aspects of the criminal law practice have recommended that the legal consequences facing a client be presented in a graphic manner[20] so that the value of the service to be rendered will be realized by the client. Of course, even without a relationship drawn by counsel there always exists a relationship between fear of punishment and willingness to pay a fee at all. What client would pay a lawyer if he did not fear conviction, imprisonment, or other punishment? Similarly, a certain amount of fear of death, disability, and pain often overcomes our reluctance to pay practitioners of the medical profession. Once possible punishment is mentioned or realized before hand by the client, fear of conviction and punishment must be an element of the relationship between attorney and client. Once the District Court refused the requested instructions concerning legitimate activities in the practice of criminal law, the Court's definition of extortion became a guided missile aimed directly at the criminal defense bar:

> It will be your duty to determine as a question of fact as to whether or not the defend-

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19 Amsterdam, *Trial Manual for the Defense of Criminal Cases* (A.L.I. - A.B.A. 1967) at 2/29; Moses, *Criminal Defense Source Book* (Lakeland Press 1974) at 25; Owen, *Defending Cases Before Juries* (Prentiss Hall 1973), at 9.

20 See Cohn, Ed. 3d *Criminal Law Seminar* (Central Book Co. 1963) at 78; Wice, *The Private Practice of Criminal Law*, 14 CRIMINAL LAW BULLETIN 396 (1978); Bailey and Rothblatt, *Defending Business and White Collar Crimes*, (Brancross Whitney 1969) at 2).

ant knowingly and intentionally utilized an actual fear within Clifford T. DeYoung with the specific intent of inducing DeYoung to part with his money or property, and when I say an actual fear, I mean a present and reasonable fear.

The law requires proof beyond a reasonable doubt that the fear was reasonable and actual and that the defendant knew of and intentionally used the actual fear because the law does not hold any man responsible for the unforseeable or the unreasonable actions of those with whom he speaks or deals, but the law does prohibit knowing and intentional use of an existing fear when this is done with the specific purpose of inducing another to part with his money or property.

(RXII 929)

Assuming that this definition is correct generally speaking, the lack of limiting instructions as proposed here converts it into wide net capable of ensnaring every member of the criminal defense bar. What defense lawyer can honestly say that he does not use a "fear" of prosecution, conviction, and punishment to collect a fee in a criminal case? Under the charge without limiting instruction, what status would be enjoyed by a criminal defense lawyer who admonishes a criminal client that he will cease representing him if the fee is not forthcoming as agreed? What status would be

enjoyed by a lawyer who justifies a criminal fee by pointing to the possible undesirable consequences that the client is facing? If these acts are criminal extortion, then let the criminal bar be forewarned by this Court.

C. *The Prior Opinions of This Court and the Courts of Appeal.*

In *United States v. Enmons*, 410 U.S. 376 (1973), this Court specifically excepted legitimate activities of labor unions from criminal liability under the "Hobbs Act" even though these activities met the technical definition of extortion, *Enmons*, at 398-400. In response to *Enmons*, the Circuit Courts did not cannibalize their extortion definitions, but instead developed a limiting instruction similar to those requested by this Petitioner, see Devitt and Blackmar, 2 *Federal Jury Practice and Instruction* §56.10 (3rd ed 1977); following *Callanan v. United States*, 223 F.2d 171, 175 (5th Cir. 1955), cert. denied 350 U.S. 862, reh. denied 350 U.S. 926; also see *United States v. Billingsley*, 474 F.2d 63, 65 (6th Cir. 1973), cert. denied 414 U.S. 819. The Petitioner argues that the denial of the limiting instructions is strictly contrary to these holdings, and a clear danger to criminal defense counsel, *Sacher, Supra*, at 13.

V

Whether The Petitioner Was Entitled To Jury Instructions Regarding the Legitimacy Of Fee-Negotiations Between A Criminal Defense Lawyer And His Client.

The Petitioner's actions as alleged at trial: (1) maintaining that the laboratory test was positive; (2) advising DeYoung that he would be arrested; etcetera could only be considered as fraudulent. There is no evidence that the Petitioner had the power to bring prosecution to bear against his own client. Indeed, when specifically asked this question, the government's own testimony was that he disavowed this intent, (RV 27). In *United States v. Heller*, 579 F.2d 990 (6th Cir. 1978), the Sixth Circuit clearly held that a defendant who falsely represented that he could intercede against the threats actually posed by others could not be convicted of extortion, *Heller*, at 1000. The holding of the Tenth Circuit in this cause runs strictly counter to this case.

VI

Whether The Offense Charged In The Indictment, To Wit: Interstate Travel Under 18 U.S.C. 1952 To Commit Extortion Under 18 U.S.C. 875, Is An Actual Offense Cognizable And Punishable Under Federal Law.

VII

Whether The Evidence Introduced At Trial And The District Court's Charge To The Jury Amounted To A Variance From The Offense Charged In The Indictment, To Wit: Interstate Travel Under 18 U.S.C. 1952 To Commit Extortion Under 18 U.S.C. 875.

A. *The Basic Offense of Extortion.*

The indictment charges interstate travel under 18 U.S.C. 1952 "with the intent to promote," etcetera "an unlawful activity, to wit: extortion in violation of Title 18, United States Code, Section 875," (RI 5). The problem is that 18 U.S.C. 875 does not prohibit extortion per se but only certain interstate activities. 18 U.S.C. 1952 proscribes travel for "extortion" and "extortion" is usually defined in terms of violation of "state law," *United States v. Brown,* 505 F.2d 261 (4th Cir. 1974), *United States v. Nardello,* 393 U.S. 286 (1969), *United States v. Karigiannis,* 430 F.2d 148 (7th Cir. 1970). Although the relevant acts occurred in California, neither Colorado nor California law was plead, proved, or included in any jury instruction. Because of this, and because 18 U.S.C. §875 is really for different crimes with different punishments, (see §875, (A), (B), (C), and (E)), the Petitioner filed a lengthy *Motion for a Bill of Particulars,* (RI 51, et seq.), which was promptly denied by the Court without requiring the government to respond.

B. *The Logical Inconsistency of the Charge.*

To paraphrase the indictment and the statute the Appellant was charged with interstate travel "with intent to . . . carry on" and interstate "communication containing [A] threat," etcetera, (see RI 5; 18 U.S.C. 875). This is a nonsensical and illogical offense. Specifically, the only evidence in this case was that the Appellant and his paralegal traveled to California to

converse with the alleged victim personally, (see RII 10-15). How could someone travel across a state line to meet another with the intention of threatening this person through an interstate communication? Suffice it to say that there was no evidence adduced below to support this legally unprecedented use of §1952 and §875, nor was the jury so charged, (RXI 925-929).

C. *Variance.*

Looking at what 18 U.S.C. §875 does proscribe, we notice that it is a penal statute dealing with "interstate communications," and actually prohibits interstate communications containing threats to persons, property, and reputation, 18 U.S.C. §875 (a), (b), (c), and (d).

Interstate communications of threats, etcetera, which is the essence of 18 U.S.C. §875, was completely ignored in proof, argument, and the Court's charge, (RXII 925-929). Here, the variance between what was charged in the indictment and what was submitted to the jury at trial was so great as to permit proof of a different crime at trial than that alleged in the indictment. When this occurs, this Court has held that it operates as a constructive amendment to the indictment and is prejudicial per se, *Stiron v. United States*, 362 U.S. 212, 218 (1960).

CONCLUSION AND PRAYER

Wherefore, the above premises considered, the Petitioner prays that this Court grant a Writ of Cer-

tiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

CHARLES LOUIS ROBERTS
Attorney of Record for
Petitioner
505 Caples Building
El Paso, Texas 79901
(915) 532-1601

CERTIFICATE OF SERVICE

The undersigned attorney of record for Petitioner, MARTIN BLITSTEIN, hereby certifies as follows:

(a) That I am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Petition for Writ of Certiorari, as hereinafter shown:

(b) That the names and addresses of the attorneys of record for the adverse party are as follows:

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Joseph Dolan
United States Attorney
Room C330
United States Courthouse
Drawer 3615
Denver, Colorado 80294

(c) That on this day I served three printed copies of the foregoing Petition for Writ of Certiorari on the said Wade H. McCree, Jr., and the said Joseph Dolan, attorneys for said Respondent, by depositing same in the United States post office, with first class postage prepaid, properly addressed to said attorneys for Respondent at their said addresses.

EXECUTED, this ____ day of November, 1980.

CHARLES LOUIS ROBERTS
Attorney of Record for
Petitioner
505 Caples Building
El Paso, Texas 79901
(915) 532-1601

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Filed: July 14, 1980

No. 78-2037

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARTIN BLITSTEIN,
Defendant-Appellant.

Appeal from the United States District Court
For the District of Colorado
(D.C. No. 78-CR-324)

Charles Louis Roberts, El Paso, Texas (Arthur W. Tifford and Melvyn Kessler, Miami, Florida, with him on the briefs), for Defendant-Appellant.

Daniel Christopher, Assistant United States Attorney (Joseph Dolan, United States Attorney, and Richard S.

Vermeire, Assistant United States Attorney, on the brief), Denver, Colorado, for Plaintiff-Appellee.

Before BARRETT, DOYLE and LOGAN, Circuit Judges.

BARRETT, Circuit Judge.

Martin Blitstein (Blitstein), a member of the Florida state bar, appeals from a jury conviction and subsequent sentencing judgment following verdicts of guilty on Counts II and V of an original five count indictment. Count II charged Blitstein with violating 18 U.S.C.A. §1343 (wire fraud) and Count V charged him with violating 18 U.S.C.A. §1952 (the Travel Act) undertaken in violation of 18 U.S.C. §875(4) (extortion).

The Indictment as to Counts II and V

Blitstein was, as previously noted, found guilty of the charges contained in Counts II and V of the original five count indictment. Counts II and V charged:

Count II: Wire Fraud:

Paragraph One (1) of this count realleged all of the allegations contained in Count I except those contained in paragraph 4, which, in capsule form, charged

that Blitstein and Kim Pease (Pease) "devised and intended to devise a scheme and artifice to defraud and for obtaining money by false and fraudulent pretenses, representations and promises from Clifford DeYoung, well knowing at the time that the said pretenses, representations and promises . . . would be false and fraudulent when made" [R., Vol. I, p. 1]. The following false representations were specified: 1) a warrant was about to be issued for DeYoung's arrest on charges of cocaine possession; 2) Colorado law made no distinction between possession of small amounts of narcotics for private use and possessing large amounts for the purpose of sale or distribution; 3) on Monday, September 18, 1978, a warrant was issued by Colorado authorities for DeYoung's arrest, and, if arrested, DeYoung would be placed in chains and pulled off the movie set and embarrassed in the presence of his friends and fellow workers; 4) Blitstein and Pease could "take care" of the arrest warrant, criminal case and adverse publicity if they received a total of $25,000.00, which request was reduced to $15,000.00; 5) Blitstein and Pease had associates who could somehow dispose of the narcotics so that no case could be filed; and 6) through the efforts of Blitstein and Pease the criminal case involving DeYoung had been terminated.

Paragraph Two (2) of this count charged that Blitstein and Pease, "On or about September 18, 1978, in the State and District or Colorado, for the purpose of executing the aforesaid scheme and artifice to defraud

and attempting to do so, transmitted and caused to be transmitted certain sounds by means of wire communications in interstate commerce, namely a telephone conversation between a telephone located in Colorado and a telephone located in California, all in violation of Title 18, United States Code, Sections 1343 and 2." [R., Vol. I, p. 3].

Count V: Travel to Commit Extortion:

This count charged that "On or about September 15, 1978, in the State and District of Colorado, and elsewhere, Martin Blitstein and Kim Pease, did travel and cause travel of Martin Blitstein and Kim Pease in interstate commerce from Colorado to California, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, to-wit: extortion in violation of Title 18, United States Code, Section 875, and thereafter did perform and attempt to perform acts to promote, manage, carry on and facilitate the promotion. management and carrying on of said unlawful activity, all in violation of Title 18, United States Code, sections 1952 and 2". [R., Vol. I, p. 5].

Factual Background

On appeal, we must view the evidence, both direct and circumstantial, together with all reasonable inference to be drawn therefrom, in the light most favor-

able to the government following a conviction. *United States v. Freeman*, 514 F.2d 1184 (10th Cir. 1975); *United States v. Twilligear*, 460 F.2d 79 (10th Cir. 1972).

Clifford DeYoung, an actor by profession, arrived at Stapleton International Airport in Denver, Colorado, on September 9, 1978, from Greeley, Colorado, where he had been on location during filming of the NBC television movie "Centennial". He planned to fly to his home near Los Angeles, California. Following a routine x-ray search of his hand carried baggage, DeYoung consented to a general weapons check of the baggage. The security guard conducting that check discovered a small vial containing a substance later identified as less than one gram of cocaine. The vial was confiscated by airport security personnel after one of the guards attached to the security unit questioned DeYoung briefly about his occupation and ownership of the vial. DeYoung acknowledged ownership. He was permitted to proceed on his flight because security officials were unable to locate a field testing "kit" for the purpose of identifying the substance in the vial. A member of the security force, Detective Handley, informed DeYoung that he would be contacted if an analysis of the substance in the vial determined it to be a controlled substance and if there was a "sufficient amount for filing of a case". [R., Vol. VII, p. 61]. Handley thereafter delivered the vial to the Denver Police Department for analysis of its contents. Significantly, an "offense report" was not prepared until September 25,

1978, and at no time during the period from the airport incident of September 9, 1978 until September 25, 1978, was Detective Handley contacted by either Blitstein or his paralegal, Pease. [R., Vol. VII, p. 78].

After DeYoung arrived in California, he contacted his business attorney about the matter, expressing his concern and his need for a good lawyer in Denver. Several days later DeYoung was referred to Blitstein, whose office was located in Vail, Colorado. DeYoung phoned Blitstein in Vail on September 12, 1978, and after relating the circumstances to Blitstein, DeYoung was given assurances by Blitstein that he would "check into it" and contact him further. DeYoung informed Blitstein during this initial conversation that he owned and possessed the miniscule amount of cocaine contained in the vial found in his hand baggage and knew it to be contraband. Blitstein informed DeYoung that "they" could come down real hard on him if they wanted to, and that he might be in a lot of trouble.

On September 14, 1978, during a telephone conversation, Blitstein advised DeYoung that the laboratory analysis of the contents of the vial had come back "positive", i.e., cocaine, and that if DeYoung sent him $5,000.00 immediately as a legal retainer, Blitstein would represent him. DeYoung complied by wiring Blitstein $5,000.00 that same day. The record shows that it was not until the following day, however, that Blitstein in fact inquired of the Denver Police Department's Vice

and Narcotics squad about DeYoung's case and the results of the test. It was then that Lieutenant Steve Metros informed Blitstein that the substance tested positive as cocaine and that Blitstein should contact a Detective Costigan to determine whether DeYoung would be "filed on". [R., Vol. III, pp. 4-6].

On September 15, 1978, Blitstein's paralegal, Pease, phoned DeYoung in California and informed him that he was going to be placed under arrest and that the case was very serious. She stated that because of the seriousness of the case she and Blitstein had to fly to California to confer with DeYoung face to face. Neither Pease nor Blitstein had contacted Detective Costigan at that time or before they left for California that same day. DeYoung met them at the Los Angeles airport and drove them to his home. Enroute, Blitstein informed DeYoung that his fee would be $25,000.00 to handle the case. There are discrepancies in the testimony with respect to what was said during the course of the meeting in California. However, the jury obviously believed the following testimony of DeYoung, which was substantially corroborated by another witness:

While driving to DeYoung's home, and after Blitstein stated that his fee for representing DeYoung would be $25,000.00, DeYoung replied that this was "pretty steep". Blitstein responded that he was giving DeYoung a "break" inasmuch as his regular fee would be $50,000.00. Pease then remarked that Blitstein was

the greatest drug lawyer in the country. At DeYoung's residence, Blitstein discussed with DeYoung various legal defenses which should be considered and Blitstein stated that DeYoung was facing from three to fifteen years in prison because Colorado law does not distinguish between a person "caught" with a small amount of cocaine for personal use and a large amount held for sale. Blitstein also related to DeYoung aspects of his legal career, stating that there were people who wished to make a movie of his life. The following morning, Pease asked DeYoung for $20,000.00. DeYoung replied that he did not have that much money in the bank. Pease then instructed DeYoung to make out two checks payable to Blitstein — one in the amount of $7,-500.00 and one in amount of $2,500.00. DeYoung complied. Blitstein and Pease departed.

The following day, DeYoung phoned Michael Dowling, a Colorado attorney, and DeYoung's cousin, David B. Davis, a California attorney specializing in criminal law. Davis advised him to stop payment on the two checks he had written payable to Blitstein. DeYoung did so, and shortly thereafter he received a phone call from a Paul Meyer, who identified himself as a financial partner of Blitstein. Meyer inquired why DeYoung had stopped payment on the two checks. Later, Blitstein and Pease phoned DeYoung. Blitstein told DeYoung that a warrant for his arrest had been issued and that DeYoung should "reinstate" the money so that Blitstein could defend him. Blitstein warned De-

Young that the minute he arrived at the Denver airport there would be a policeman waiting for him and that the police would come out to the movie location set and drag him off in chains because the police are animals and would like to humiliate him. DeYoung then stated to Blitstein that he would provide the money, but that he wanted Blitstein to speak with his cousin, attorney Davis. Blitstein phoned Davis, who told Blitstein that he believed Blitstein had acted unprofessionally by reason of his flight to California and his subsequent coercion and intimidation of DeYoung. Further, Davis stated that Blitstein's telephone remarks to DeYoung that an arrest warrant had been issued and that DeYoung would go to prison were unprofessional, coercive and intimidating. Pease came on the line and said to Davis that Blitstein was a great and competent lawyer, highly experienced in criminal law and the "biggest dope lawyer in this area". Blitstein told Davis that he had reduced DeYoung's fee to $25,000.00 because he liked him, that time was of the essence, and that unless DeYoung made the checks good within the next two hours, there would be a warrant issued for DeYoung's arrest. Blitstein said "once the evidence leaves Denver" [for Miami] he could not control it any longer. When Davis asked what he meant, Blitstein said that the evidence was going to be analyzed in Miami and "his people" could take care of it but it would have to be done within the next two hours. This telephone conversation terminated when Blitstein asked Davis what he planned to tell DeYoung. Davis responded that

it was none of Blitstein's business. Thereafter, Davis phoned DeYoung and advised him that he was getting "ripped off" and that there was "no evidence there is a case".

Blitstein phoned DeYoung again and stated that Davis was a fool, an incompetent who knew nothing about Colorado law. DeYoung then reinstated the checks and so informed Blitstein, who advised DeYoung to wire the money. Blitstein congratulated DeYoung and remarked that DeYoung would now have nothing to worry about. DeYoung thereafter spoke with Attorney Dowling of Telluride, Colorado, and again stopped payment on the checks in question. At a later date, Pease contacted DeYoung at a Denver motel and remarked to him that he was heading for jail before Blitstein got him off. The testimony of attorney Davis, DeYoung's cousin, was corroborative of a substantial and significant portion of DeYoung's testimony.

Blitstein testified in his own defense to the following: After obtaining the $5,000.00 retainer from DeYoung on September 14, 1978, he contacted an officer with the Denver Police Department Vice and Narcotic Section the following day and learned that the forensic laboratory test showed that the vial contained cocaine and that a warrant would probably issue; Blitstein was told he should contact the agent in charge, Mr. Costigan; within an hour, Blitstein phoned DeYoung and ad-

vised him of the police report and arranged the meeting in California; during the personal conferences in California with DeYoung, Blitstein simply explained to DeYoung what could happen if he were prosecuted and advised that there were certain procedures which could be used to avoid "public" arrest; he denied stating to DeYoung that he made any of the alleged material misrepresentations contained in the indictment (as testified to by DeYoung, and corroborated in substantial part by Davis) and, instead, he stated that he requested the $25,000.00 fee in order to represent DeYoung on that which he believed to be an impending prosecution.

Blitstein further testified that: He did not at any time represent to DeYoung or Davis that a warrant had been issued by Colorado officials for DeYoung's arrest involving the drug charge; the $25,000.00 fee would have involved all legal representation of DeYoung involving issuance of a warrant, pretrial motions, and trial; he would make every effort to see that DeYoung's arrest be accomplished quietly so as to avoid embarrassment and undue publicity; and during the telephone conversation of September 18, 1978, he informed DeYoung that no warrant had been issued and no charges filed against him as of that date and that he (Blitstein) was happy about it.

Detective Costigan, to whom Blitstein was referred for the purpose of determining whether any charges

would be filed against DeYoung, testified that he was never contacted by Blitstein or Pease. [R., Vol. VII, p. 139]. One David Neff, a Deputy United States Marshal, testified that he spoke with Pease on September 14th and 15th and informed her that there was no federal warrant outstanding for DeYoung. [R., Vol. VIII, pp. 211, 217].

Trial Court's Instructions

The trial court's instructions, which are not challenged on appeal, were prefaced by the Court's preliminary advisement to the jury that their basic function is "a search for the truth." The Court instructed, *inter alia*, that: The jurors were the sole judges of the facts; the defendant is cloaked with the presumption of innocence throughout the trial and must be acquitted unless the jurors are satisfied beyond a reasonable doubt of his guilt after a careful and impartial consideration of all the evidence in the case; in deciding the case, the jury must consider both direct and circumstantial evidence; the words "scheme and artifice" as used in the statute include a plan or course of action intended to deceive others, and to obtain by false and fraudulent pretenses, representations or promises money or property from the persons so deceived; a statement or representation is false or fraudulent within the meaning of the statute if known to be untrue or made with reckless indifference as to its truth or falsity and made or caused to be made with the intent to deceive; *a false or*

fraudulent representation may be made by statements of half-truths or the concealment of material facts as well as by affirmative statements of facts; if the jury should find that the statements and representations made by the defendant over the wire were made with a good faith belief in their truth, the jury should acquit the defendant; under the extortion count (Count V) the jury must find that the defendant, following the interstate travel from Colorado to California, performed acts of extortion by threatening to cause the arrest of DeYoung for the purpose of influencing him to pay money; and that the term "fear" in relation to extortion or threat to extort does not necessarily refer to physical fear or fear of violence but includes fear of economic loss or an adverse effect upon a profession or reputation. [R., Vol. XII, pp. 915-941].

Issues on Appeal

On appeal, Blitstein contends that his conviction should be set aside in that: (1) The facts are insufficient as a matter of law to sustain his conviction due to (a) insufficiency of evidence that he devised or practiced a scheme to defraud, (b) insufficiency of evidence that he extorted or attempted to extort money from DeYoung, and (c) insufficiency of evidence that he traveled in interstate commerce on September 15, 1978, with intent to carry on extortion on September 18, 1978; (2) the totality of the circumstances in this case constitutes selective prosecution of an attorney

specializing in criminal defense cases for his financial arrangements with clients such as to merit dismissing the indictment; (3) the totality of the circumstances in this case constitutes prosecutorial misconduct by way of reprisal and vindictiveness based upon previous history between Blitstein and the federal prosecutors justifying dismissal of the indictment; (4) venue was not properly laid in the District Court as to Count V of the Indictment, since the undisputed facts establish that the District of Colorado was the district from which Blitstein commenced his travel; (5) the trial court denied Blitstein due process of law and a fair trial by permitting and sanctioning prosecutorial misconduct involving (a) cross-examination of Blitstein concerning undetermined bar charges, and (b) prejudicial argument and inflammatory comments; and (6) the above and foregoing procedural errors, commencing with the denial of Blitstein's motion for a Bill of Particulars, and terminating with the refusal to instruct the jury on the theory of the defense *in tandem*, substantially prejudiced Blitstein and denied him due process of law and a fair trial.

Discussion and Disposition

I.

Blitstein contends that the facts are insufficient as a matter of law to sustain his conviction under Counts II and V, with specific failure to establish (a) that he devised or practiced a scheme to defraud, (b) that he ex-

torted or attempted to extort money from DeYoung, and (c) that he traveled in interstate commerce on September 15, 1978, with intent to carry on extortion on September 18, 1978.

The evidence in support of the jury's verdict, contrary to Blitstein's contention, is substantial. Failing to attack the weight of the evidence with cogent, convincing argument, Blitstein instead has sounded the alarm on behalf of the entire criminal defense bar in contending that if the procedure exercised by Blitstein in this case be fraud, ". . . this court . . . [should] quickly forewarn the Criminal Defense Bar." [Reply Brief of appellant p. 8]. Again: "Simply stated: Mr. Blitstein found not a single published opinion of law previously determining or reviewing a lower court judgment determining that an attorney's insistence on the prepayment of a fee, especially when working on criminal defense matters, demonstrated an intent to defraud." [Opening Brief of appellant, p. 19]. We are unimpressed. The clarion call rings hollow before this Court. The protest of concern for the "Criminal Defense Bar" is, in our view, unrepresentative of those who honor their status as officers of the court.

A complete review of the record establishes that the evidence, direct and circumstantial, together with all reasonable inferences to be drawn therefrom, firmly and substantially supports the jury's verdict. Blitstein defrauded his client, DeYoung, by means of a series of

sordid acts, practices and pretenses which, in totality, can fairly be defined as lies, blatant misrepresentations, and a scheme designed to cheat. The learned trial judge, at the hearing for final disposition following trial, said it all:

> I know what it means to a lawyer because I have been one for over fifty years, but I have consistently felt that those of the so-called white collar group who commit offenses against the laws of either the state or the nation should be punished just as those in the so-called blue collar group or some of those who are less fortunate than we sometimes characterize as the derelicts of society.
>
> Yes, you have had a good education. You climbed high, in a relatively short time, but there is a bigger obligation on the part of those who reach heights such as you have, than there is of those who have never been able, for whatever reason, to reach any height of success.
>
> I am of the opinion, sir, from the evidence in this case, that you have treated the practice of law as a business rather than as a profession. Most lawyers are mighty proud of being lawyers and we have to act with propriety each day to gain any respect from the populace, from the people.

Lawyers are too much looked down upon and often unjustly, but when we convert what is an important profession to a business where we reach out for money — I have heard you say that you have never turned down a client because they weren't able to pay.

MR. BLITSTEIN: Yes, sir.

THE COURT: But I have heard the evidence in this case where you sought first $50,000, $25,000, down to $15,000, and you did get $5,000 in cash, and there was no case filed against Mr. DeYoung in any court in connection with the transaction that occurred at Stapleton Airport on September 9, 1978.

* * *

You didn't make any threats in the sense of injuring a person physically. There was certainly some evidence that the man was not only in fear because of the circumstances in which he found himself, but that that fear increased because of the statements which you, the evidence showed, made to him regarding the probable consequences of his act.

This is not the first time that I have had the unpleasant task of sentencing a colleague at the bar, a lawyer, but we must hold ourselves up to the highest degree of recognizing that the law applies to every man, and I underline every man, regardless of his position in life,

his status, his economic condition, his education or his upbringing.

[R., Transcript of Proceedings, December 19, 1978, pp. 7-9].

The trial court entered concurrent sentences of two years on each count, but directed that all but six months thereof be suspended and that the six months be served in a treatment type institution, and at the conclusion of that period Blitstein be placed on probation for the balance of the term. The Court also assessed a fine of $1,000.00 on Count II and $2,000.00 on Count V.

High standards of moral and ethical conduct have historically been imposed upon members of the legal profession, regardless of their expertise and status among their peers. Those who use the tools of the legal profession to prostitute its high standards of ethical and moral conduct serve only to destroy the admirable goals and aims of our criminal justice system. Appellant Blitstein's conduct in the case at bar was demeaning of his obligation to serve the public good.

II.

Blitstein's contentions that the "totality of the circumstances" constitutes selective prosecution of an attorney specializing in criminal defense cases, and shows prosecutorial misconduct by way of reprisal and

vindictiveness based upon previous history between Blitstein and federal prosecutors justifying dismissal of the indictment, border on the frivolous. The contentions do not find support in the record. Beyond this, these contentions are made by insinuation, innuendo, and completely unfounded, wholly speculative "opinions" advanced both in the briefs and in the course of oral argument.

That there existed prior "friction" and strained relations between Blitstein and members of the staff of the United States Attorney for the District of Colorado appears to be true and somewhat interesting, but it is no more than that. In the give-and-take of litigative combat, it is hardly news to learn that the zeal of opposing counsel results in heated head-to-head combat.

We are not impressed by Blitstein's effort to present himself as the "target" for selective and vindictive prosecution because of his previous "entanglements" with the office of the United States Attorney. Attached to Blitstein's Motion for Change of Venue or Continuance Based Upon Prejudicial Pre-Trial Publicity is an Exhibit "I" consisting of an article appearing in the *Rocky Mountain News* which relates that Chief Judge Fred M. Winner of the United States District Court for the District of Colorado dismissed a charge lodged by Blitstein that he had been intimidated by the United States Attorney's office leading to the instant indictment. The article reads in part:

Winner said Blitstein's allegations were "a contrived charade and a ploy" aimed at playing "games with the court and with our system of justice."

Blitstein, who is under federal indictment for extortion and wire fraud, claimed he was intimidated by the U.S. attorney's office during the drug trial of Breckenridge dentist Jeffrey Mortenson, who later was acquitted.

* * *

During the dentist's trial, Blitstein accused Assistant U.S. Attorney Nancy Rice of making false statements. During a recess, Assistant U.S. Attorney Richard Stuckey told Blitstein that he resented the accusation against Ms. Rice and if it happened again, he would take Blitstein "to the mat — hard."

* * *

But in a sharply worded eight-page opinion, Winner said, "If Mr. Blitstein is so easily intimidated, he should retire from the trial bar. . . . If a statement by an opposing lawyer saying that something will be vigorously pursued drives a lawyer from a case, that lawyer should confine his practice to office work, and he certainly should not try criminal cases in 40 federal courts in a short span of 10 years" (as Blitstein claimed he had).

* * *

"From my personal observation, 'intimidated counsel' has been in the pits before and he can take good care of himself in a rough and tumble trial", Winner said.

[R., Vol. I, p. 49].

We echo the views expressed by Chief Judge Winner. We find then quite applicable to the "vindictive and selective" contention advanced by Blitstein on this appeal, particularly inasmuch as this record is absolutely barren of any proof that the Government failed or refused to prosecute others similarly situated to Blitstein. It is the obligation of a criminal defendant to demonstrate that the government's prosecution of him was based upon clearly impermissible discriminatory grounds such as race, religion or his exercise of first amendment rights to free speech. *United States v. Moss*, 604 F.2d 569 (8th Cir. 1979), U.S. App. Pndg.; *United States v. Torquato*, 602 F.2d 564 (3d Cir. 1979), *cert. denied* ___ U.S. ___. And mere failure to prosecute other offenders is no basis for a finding of denial of equal protection. The conscious exercise of some selectivity in enforcement is not per se a federal constitution violation. *Oyler v. Boles*, 368 U.S. 448 (1962); *Cook v. City of Price, Carbon Cty., Utah*, 566 F.2d 699 (10th Cir. 1977); *United States v. Brookshire*, 514 F.2d 786 (10th Cir. 1975). Moreover, there is a presumption that prosecution for violation of the criminal law is in good faith. *United States v. Bennett*, 539 F.2d 45 (10th Cir. 1976), *cert. denied* 429 U.S. 925 (1976).

In light of the record before us and given the fact that Blitstein was found guilty by an impartial jury of the violations charged in Counts II and V based on the evidence adduced, we hold that the presumption of good faith is firmly established. The trial court did not err, following an evidentiary hearing, in ruling that the instant prosecution did not deny Blitstein equal protection of the law and was not vindictive.

III.

Blitstein argues that venue was not properly laid in the District Court as to Count V of the Indictment inasmuch as the undisputed facts established that the District of Colorado was the district from which Blitstein commenced his travel. He relies upon *Spinelli v. United States*, 382 F.2d 871 (8th Cir. 1967), *rev'd on other grounds*, 393 U.S. 410 (1969) for the proposition that a substantive violation under the Travel Act statute occurs after the travel took place, i.e., actual crossing of the state line. We decline to adopt the *Spinelli* interpretation of the statute. In our view, venue was properly laid in the United States District Court for the District of Colorado.

We are persuaded that the interpretation of the Travel Act venue statutes set forth in *United States v. Polizzi*, 500 F.2d 856 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975), is correct. The court there held that ". . . a defendant can be prosecuted for traveling in violation of section 1952, or for aiding and abetting such travel,

in any district in which the travel occurred." 500 F.2d at p. 899.

This Court observed in *United States v. Villano*, 529 F.2d 1046 (10th Cir. 1976), *cert. denied*, 426 U.S. 953 (1976) that the Travel Act statute covers those who travel in interstate commerce or use interstate facilities with the intent to promote unlawful activity. The plain language of the statute covers the activity charged to Blitstein in the case at bar. In pertinent part it reads:

> 18 U.S.C. §1952:
>
> Whoever travels . . . or uses any facility in interstate or foreign commerce, including the mail, with intent to . . . (3) otherwise promote, manage, establish or carry on, . . . any unlawful activity, and thereafter performs or attempts to perform any of the acts specified . . . shall be fined or imprisoned.
>
> (b) as used in this section "unlawful activity" means . . . (2) extortion . . . in violation of the laws of . . . the United States.

In our view, the statute, on its face, encompasses the illegal activity charged to Blitstein. The travel here involved originated in Colorado in order to promote, manage, and carry on the unlawful activity of extortion, i.e., travel from Colorado to California for the purpose of extorting from DeYoung exorbitant fees in a "case" wherein no prosecution had been initiated or any arrest warrant issued.

IV.

We have carefully considered each of the remaining allegations of error advanced by Blitstein and hold that they are, individually and cumulatively, without merit.

During his direct examination, Blitstein testified at length that: He was a litigation specialist with extensive experience in the criminal practice, primarily as a drug defense attorney who had appeared in many, many courts since he was admitted as a member of the Florida bar in 1968 [R., Vol. X, p. 586]; his fee schedule for narcotics violations "be they large or small" was $50,000.00 and his per diem rate out of his Miami law office was $3,000.00 [R., Vol. X, pp. 622, 623]; that he was not a member of the Colorado bar and would have to retain local counsel out of a portion of his fee [R., Vol. X, p. 623]; that in the past ten years he had accumulated in excess of a million dollars in unpaid bills [R., Vol. X, p. 627]; and that he was not a "run-of-the-mill" inexpensive lawyer. [R., Vol. X, p. 636]. Thus, Blitstein did not hesitate to elevate himself as a member of the bar with outstanding credentials and reputation. On cross-examination, Blitstein was asked "there was a period of 45 days during that period (since his admission to the Florida bar in 1968), was there not, when your license to practice was suspended?", to which Blitstein responded, "yes, sir." [R., Vol. XI, p. 720]. The trial court admitted this cross-examination predicated on Blitstein's extensive testimony about his outstanding experience and professional reputation as

a specialist in the field of criminal defense, particularly in relation to drug-offense cases, where he was much sought after. The trial court admitted this cross examination over objection not in relation to Blitstein's "character as such" but probative of the truthfulness or untruthfulness of his status with the professional bar, pursuant to Fed. Rules Evid. rule 608(b), 28 U.S.C.A. No error occurred. Blitstein injected his good reputation as a member of the bar by reason of his extensive testimony aforesaid, thus opening the door to the very limited impeachment evidence which did not in anywise involve criminal proceedings. *Cf. United States v. Heath*, 580 F.2d 1011 (10th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979). The extent of cross-examination is a matter within the trial court's discretion which will not be disturbed in the absence of proof of abuse of discretion. *United States v. Speir*, 564 F.2d 934 (10th Cir. 1977), *cert. denied*, 435 U.S. 927 (1978); *United States v. Hodges*, 480 F.2d 229 (10th Cir. 1973). *See also: United States v. Giese*, 597 F.2d 1170 (9th Cir. 1979), *cert. denied*, ____ U.S. ____.

There is nothing in this record evidencing prosecutorial misconduct. The record must show prosecutorial misconduct rising to the level of plain error in the absence of an objection or request for corrective instructions. *United States v. Jones*, 578 F.2d 1332 (10th Cir. 1978), *cert. denied*, 439 U.S. 913 (1978); *United States v. Bishop*, 534 F.2d 214 (10th Cir. 1976); Fed. Rules Cr. Proc., rule 52(b), 18 U.S.C.A.

The totality of the Government's evidence was strong. Where the evidence against the accused is strong, the appellant must show that the prejudice he claims constitutes plain error. *Hall v. United States*, 404 F.2d 1367 (10th Cir. 1969). A conviction will not be disturbed on appeal where it is clear, after a careful review of the whole record, that the alleged errors did not deprive the appellant of his substantial rights. *United States v. Bishop, supra; United States v. Lemon*, 497 F.2d 854 (10th Cir. 1974). Such is the case here. *Cf. United States v. Williams*, 445 F.2d 421 (10th Cir. 1971), *cert. denied*, 404 U.S. 966 (1971). A review of the record satisfies us that Blitstein received a fair trial.

The remaining issues raised by Blitstein which have not been specially addressed or discussed have been considered. We hold that they are legally insubstantial. *United States v. Brown*, 600 F.2d 248 (10th Cir. 1979), *cert. denied*, ____ *U.S.* ____ (1979); *United States v. Porth*, 426 F.2d 519 (10th Cir. 1970), *cert. denied*, 400 U.S. 824 (1970).

WE AFFIRM.

DOYLE, Circuit Judge, specially concurring.

I concur fully in the judgment. Although I agree with the legal conclusions of the majority and am also in agreement with the reasoning contained in the majority opinion, I am unable to subscribe to the entire opin-

ion. My disagreement is with the characterizations of the defendant personally that are found in the majority opinion. It is only because they are unnecessary and not because I am sympathetic to the defendant.

The appellant is not before us in a disbarment proceeding, and although I can understand the desire of the majority to emphasize that as a member of the bar he should have observed the high standards which the profession exacts, the facts here speak for themselves and render it unnecessary to add to the lengthy and explicit statement of the evidence and to the legal effects which flow from that description.

APPENDIX B

SEPTEMBER TERM — SEPTEMBER 17, 1980

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus No. 78-2037

MARTIN BLITSTEIN,
Defendant-Appellant.

This matter comes on for consideration of appellant's petition for rehearing with suggestion for rehearing en banc together with appellant's corrected petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing and corrected petition for rehearing are denied by the judges who were members of the panel who rendered the decision sought to be reheard.

The suggestion for rehearing and the corrected petition for rehearing and suggestion for rehearing en banc having been transmitted to the members of the panel and the judges of the Court who are in regular active service and no member of the panel nor judge in regular active service having requested a vote on such suggestion, the suggestion for rehearing en banc and corrected suggestion for rehearing en banc are denied.

/s/ HOWARD K. PHILLIPS
HOWARD K. PHILLIPS
Clerk

A true copy.

/s/ THERESA SMITH
Deputy Clerk

APPENDIX C

§1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Added Pub.L. 87-228, §1(a), Sept. 13, 1961, 75 Stat. 498, and amended Pub.L. 89-68, July 7, 1965, 79 Stat. 212.

APPENDIX D

§875. Interstate communications

(a) Whoever transmits in interstate commerce any communication containing any demand or request for a ransom or reward for the release of any kidnapped person, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(c) Whoever transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another,

shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(d) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined not more than $500 or imprisoned not more than two years, or both.

June 25, 1948, c. 645, 62 Stat. 741.

-TION FILED
DEC 17 1980

No. 80-791

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARTIN BLITSTEIN,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, INC., AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR CERTIORARI

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versus

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Respondent.

On Petition for a Writ of Certiorari to
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For the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc., Amicus Curiae, by and through Alan Ellis, Co-Chairman of its Amicus Curiae Committee, moves this Court for leave to file a brief as Amicus Curiae in support of the Petition for Certiorari in *Blitstein v. United States*, heretofore filed in this Court, and for grounds would show this Court that: (1) the above Association has a strong and legitimate interest in said

Petition, and (2) that the above Association has submitted a request for consent to the Solicitor General of the United States, but has received no reply as of this date.

WHEREFORE, the Movant prays that this Court grant leave to file a brief in support of the Petition for Certiorari in the above cause.

Respectfully submitted,

ALAN ELLIS
Co-Chairman, Amicus Curiae Committee
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QUESTIONS PRESENTED

This Brief is addressed solely to the questions of:

(1) Whether a trial court should be required: (a) to exercise careful scritiny; and (b) to place the burden of proof upon the prosecution in a case where defense counsel has presented a prima facie case to the effect that his prosecution was the result of a selective and vindictive prosecution against him, and that such prosecutorial vindictiveness was engendered by his prior activities as defense counsel.

(2) Whether evidence concerning other acts of prosecutorial intimidation of defense counsel committed by the same United States Attorney's office are admissible in support of a claim of selective and vindictive prosecution of a defense counsel.

(3) Whether the definition of extortion given by the court below coupled with its refusal to give requested charges which would limit such definition to activities outside of the legitimate practice of criminal law poses a danger to criminal defense counsel in the performance of their duties in our adversary system.

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No. 80-791

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, INC., AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR CERTIORARI

INTEREST OF AMICUS

The National Association of Criminal Defense Lawyers Association, Inc., is a District of Columbia

non-profit organization whose membership is comprised of approximately 1,600 lawyers who are citizens of every state in the union, all of whom are primarily engaged in positions bringing them into daily contact with the criminal justice system either as advocates, law professors or judges of the state and federal courts. Among its stated objectives is to promote the proper administration of criminal justice and to thereby concern itself with the protection of individual rights and the improvement of criminal law, its practices and procedures. Within the general purpose, there is also a specific objective of maintaining a vigorous and independent criminal defense bar which will be able to adequately fulfill its function in our adversary criminal justice system. This Brief is tendered in the discharge of that organizational objective.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

Whether A Trial Court Should Be Required: (A) To Exercise Careful Scrutiny; And (B) To Place The Burden Of Proof Upon The Prosecution In A Case Where Defense Counsel Has Presented A Prima Facie Case To The Effect That His Prosecution Was The Result Of A Selective And Vindictive Prosecution Against Him, And That Such Prosecutorial Vindictiveness Was Engendered By His Prior Activities As Defense Counsel.

A. The Actual Performance of the Trial Court in Disposing of this Issue.

Prior to his trial, the Petitioner herein, Martin Blitstein, filed a *Motion to Dismiss Indictment Based Upon Prosecutorial Misconduct* which alleged a selective and vindictive prosecution, (RI 51-98), and included several exhibits, transcripts, etcetera (RI 63-98). Also filed was a *Proffer of Expected Testimony* dealing with the subject of his *Motion to Dismiss*, (RI 30-35). The Court denied the *Motion* prior to trial, (RI 100). During trial, the Court received some defense testimony on this issue (RIX 410, et seq), and excluded other testimony, (RIX 407, et seq). The excluded testimony dealt with recent attempts by the same United States Attorneys involved here to threaten and intimidate defense counsel so as to interfere with their representation of criminal clients, (see 401 et seq). Including admitted and excluded evidence, the defense submitted a prima facie case to the effect that: (1) there were personal animosities against the Petitioner harbored by the members of the United States Attorney's office, (RIX 434, 443); (2) that these animosities were engendered by Petitioner's representation of a criminal client, (RIX 434, 443); (3) that the United States Attorney's office had previously sought to give expression to these animosities against the Petitioner in an unprecedented contempt action, (RI 63) which was removed to a non-presiding judge when the presiding judge refused to hear it, (RIX 446); (4) that following this attempt, a senior member of the United States Attorney's office threatened Peti-

tioner in Court, (RIX 418); (5) that other criminal defense attorneys in the District of Colorado had been similarly threatened with prosecution and imprisonment by the same United States Attorneys after vigorous defenses of "guilty" clients, (RIX 406);[1] (6) that the initial interview and investigation was conducted by the Assistant United States Attorney who had earlier attempted the contempt action, (RIX 469, 472-473, 482-483); and (7) Petitioner was neither interviewed concerning this matter, nor informed of his "target" status, nor given an opportunity to testify before the grand jury.[2] Later, the Court reaffirmed its decision to deny, (RXI 893). The words of the Court in denying the *Motion* for the second time, revealed: (1) that the Court was placing the entire burden of proof upon the Movant; and (2) that a colorably valid prosecution, i.e., one supported by probable cause, was all that was required to negate a claim of selective and vindictive prosecution of a defense counsel, (RXI 893, et seq). It is the position of the Amicus that the procedures and standards adopted below were not adequate to consider and dispose of a claim of this nature.

B. *The Role, Responsibility, and Liability of a Criminal Defense Lawyer in our Criminal Justice System.*

The role of the criminal defense lawyer in our criminal justice system is that of an effective and vigorous

---

1 This evidence was excluded from consideration by the Court as being irrelevant, (RIX 406).

2 9 *United States Attorney's Manual* §9-11.253 (Dept. of Justice August 7, 1978).

adversary in a system where the opponent, the government, has a considerable advantage in manpower and wealth among other things. It is not a particularly easy profession.[3] Although the responsibility of effective representation has always been there, the courts have been developing an evermore strict legal definition, perhaps in response to what is seen as a deficiency in the quality of representation in criminal cases, Erickson AMER. CRIM. L. REV. 233 (fall 1979) at 239-240. Aside from the possible embarrassment and disciplinary actions which can flow from ineffective representations, there is always the possibility of civil liability. While the judiciary, *Pierson v. Ray*, 386 U.S. 547 (1967) and the prosecution, *Imbler v. Pachtman*, 427 U.S. 409 (1976), are cloaked in a mantle of immunity, defense counsel remains out in the cold. Thus, a defense counsel must be effective for a variety of reasons.

This effectiveness is often judged by legal standards; however, one must realize that there is a social value in a defendant feeling that he has had effective representation regardless of the result. A recent study has shown the primary factor of judging defense lawyers is the defendant's view of their lawyer as one who presented a forceful and vigorous defense of his

---

3 As one authority advised beginning criminal lawyers:
Seven out of every ten jury trials result in a conviction. In the Federal Court the percentage is higher. A mistrial or a hung jury is a modest victory. The facts are against you most of the time. The odds are against you all of the time, Owen, *Defending Cases Before Juries* (Prentice-Hall 1973) at 1.

client in the courtroom, or one who "talks up in Court."[4] Of course, a defense counsel who unashamedly presents a forceful defense of his often guilty clients runs the risk of going head to head with a prosecutor. He often may be heartily disliked and even despised by a prosecutor. A prosecutor may feel that society should not permit an unabashed and vigorous defense of a person who not only is considered to be guilty but also a threat to society. We can see this attitude in the excluded testimony below concerning another Colorado defense attorney:

> . . . following the motion to suppress, Mr. Stuckey physically confronted Mr. Worth blocking his course of travel across the courtroom following the Judge's departure from the courtroom; that while physically confronting Mr. Worth and after blocking his travel, Mr. Stuckey said to him the following words, "People like him," referring to his client, "ought to be in prison and people like you who defend him should also be imprisoned, and we have ways of taking care of defense attorneys like you." (RIX 404).

While animosity toward a particular criminal defendant who might have escaped the long arm of the law on

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4 "The lawyering value considered to be most important was 'talks up in court' with a rating of 1.087, indicating that almost *every* inmate considered it very important." O'Brien, Pheterson, Wright and Hostica, AM. J. CRIM. LAW, 283 (Oct. 1977), at 293.

prior occasions might be somewhat unprofessional, it can exist within the criminal justice system. However, personal animosity toward a defense counsel and a belief that he should be "stopped," (RIX 443), runs counter to the interests of our adversary system. The prosecutor's office has wide latitude and discretion in its prosecutors. The prospect of indictment even with subsequent acquittal is synonymous with the specter of financial and reputational ruin. In the view of criminal defense attorneys who value both these values, it is not a sanction to be taken lightly. Thus, personal animosity on the part of a prosecutor which finds vent in a discretionary prosecution which otherwise would not have been brought can be an intimidating and quieting influence on what otherwise would be a more vocal and vigorous defense bar.

Examining the adversary system, we find that there are little or no safeguards against such abuses. While both the prosecutor and the court are shielded by immunity and possessed of great powers to be wielded in the public good, defense counsel can only bargain with the prosecutor, persuade the court, or occasionally prevail before a jury. This Court has held that the prospect of even civil liability much less criminal liability would intimidate a prosecutor and create "an adverse effect upon the functioning of the criminal justice system," *Imbler*, at 426. However, this same opinion recognized "that both the prosecution *and the defense*" needed this freedom from intimidation to perform their respective functions, *Imbler*, at 426. In *Hoar v. Wood*, 44

Mass 193 (1841), Chief Justice Shaw wrote about this need:

> . . . it is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech, in conducting the causes and advocating and sustaining the rights, of their constituents. . . . *Hoar*, at 197-198

However, if this "full freedom" is seen as likely to cause displeasure on the part of opposing counsel and perhaps further result in a prosecution which otherwise might not have been brought, it is questionable whether it will be exercised in the full and vigorous extent necessary to our adversary system. Putting the shoe on the other foot, could the prosecutor effectively exercise this freedom and perform their function within the adversary system if defense counsel possessed the discretion to seek indictments against these same prosecutors? *Imbler* answers this question by holding it would impair the adversary system to burden the prosecution with the prospect of *civil liability* even where he may have utilized perjured testimony or suppressed exculpatory evidence, *Imbler*, at 421, N. 34. Thus, it must be seen that prosecutions or threat of prosecutions emulating from personal animosities against defense counsel pose a danger to the adversary system. Accordingly, Amicus has begun studies which include this problem of selective prosecution against

defense counsel with special emphasis on prosecutions where defense counsel's clients are utilized against him as in this case.[5] However, studies are not solutions and the problem remains.

C. *Reasons why Certiorari Should Be Granted.*

Amicus recognizes that the prosecutor must have the power to prosecute defense counsel; however, it must also be recognized that unlimited prosecutorial discretion without close and careful scrutiny of the courts could do far more harm to the adversary system than that envisioned from mere civil liability in *Imbler*. One of the problems involved in this matter is that there are no standards as to the level of scrutiny or the procedures to be utilized. It is clear that ordinary standards of prosecutorial selectiveness and vindictiveness, see *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973), *Blackledge v. Perry*, 417 U.S. 21 (1974) do not perfectly apply themselves to this situation. The danger posed to the ordinary citizen from a prosecutor's personal animosity is rather slight as compared to these who must go toe to toe with this prosecutor on a daily basis. Also, an individual citizen's prosecution, while perhaps an injustice, does not pose a concrete threat to the adversary system. While freedom from prosecution is unthinkable, standards which could protect and insure

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5 See Maloney, *Report on Prosecutorial Misconduct, Natl. Assoc. of Criminal Defense Lawyers*, (August 23, 1980), 10 VOICE FOR THE DEFENSE 7, 8-10 (Aug/Sept. 1980).

the continued independence and effectiveness of the criminal bar are both thinkable and needed. Such standards do not exist and the trial court's handling of this matter is evidence of this lack. The Amicus would suggest that this lack of applicable standards represents the most compelling reason for the granting of a Writ of Certiorari.

D. Standards Applicable to Prima Facie Claims of Prosecutorial Selectiveness and Vindictiveness.

When a prima facie case of prosecutorial selectiveness and vindictiveness against a criminal defense counsel is presented, the trial court (1) should be required to exercise close scrutiny on the matter, and (2) should place the burden of proof upon the government. Considering the small number of these prosecutions and the smaller number wherein a prima facie case could be made, this would work no great hardship upon the prosecution. Indeed, considering the other side of the coin, the damage which might be done to the adversary system by unsupervised and unchecked prosecutions of defense counsel, the cost would be slight. The courts have promised to safeguard the criminal defense bar from attempts to stifle their advocacy, *Sacher v. United States,* 343 U.S. 1 (1952), at 13. It is this supervision to safeguard the adversary system that is requested herein.

II.

Whether Evidence Concerning Other Acts Of Prosecutorial Intimidation Of Defense Counsel Committed By The Same United States Attorney's Office Are Admissible In Support Of A Claim Of Selective And Vindictive Prosecution Of A Defense Counsel.

The trial court only allowed the Petitioner to present evidence of his own plight and refused to accept evidence of the plight of other defense counsel, (RIX 406). Worse than a single abuse of prosecutorial discretion in intimidating defense counsel would be a campaign to intimidate defense counsel in general. Under the court's ruling below, evidence of this grave situation could never be presented. Again, the lack of applicable standards calls for this Court's resolution. Again, the court's prior promises to safeguard the criminal defense bar are invoked.

III.

Whether The Definition Of Extortion Given By The Court Below Coupled With Its Refusal To Give Requested Charges Which Would Limit Such Definition To Activities Outside Of The Legitimate Practice Of Criminal Law Poses A Danger To Criminal Defense Counsel In The Performance Of Their Duties In Our Adversary System.

At trial, the court instructed the jury as to extortion:

> It will be your duty to determine as a question of fact as to whether or not the defendant knowingly and intentionally utilized an actual fear within Clifford T. DeYoung with the specific intent of inducing DeYoung to part with his money or property, and when I say an actual fear, I mean a present and reasonable fear.
>
> The law requires proof beyond a reasonable doubt that the fear was reasonable and actual and that the defendant knew of and intentionally used the actual fear because the law does not hold any man responsible for the unforseeable or the unreasonable actions of those with whom he speaks or deals, but the law does prohibit knowing and intentional use of an existing fear when this is done with the specific purpose of inducing another to part with his money or property. RXII 929

Defense counsel at trial requested instructions which would limit the application of this general definition so as to make it inapplicable to the legitimate practice of criminal law:

> The statute under which the charges are based has no reference or bearing on action by an attorney, honorestly [sic] acting and representing clients. It has reference to and bears on interference with interstate commerce by

> the compulsory payment of money extorted by a person for his own individual benefit. Sup RI 3
>
> You are instructed that with respect to the charges contained in the indictment, the specific amount of attorney fees either charged or received is not relevant. Sup RI 6

This instruction is similar to the instruction concerning legitimate labor activities utilized by many courts:

> The statute under which the charges are based has no reference or bearing on action by a labor organization leader, honestly acting and representing members of his organization. It has reference to and bears on interference with interstate commerce by the compulsory payment of money extorted by a labor leader for his own individual benefit. 2 Devitt and Blackmar §56.10

The above instruction was necessitated by the fact that some labor activities such as strikes and threatened strikes fell under the global definition of extortion even though Congress did not intend these activities to be criminalized, *United States v. Enmons*, 410 U.S. 376 (1973). Thus, the limiting instruction was composed to follow the congressional intent. Can it be said that it was the will and intent to criminalize the conduct of criminal defense counsel who utilize an existing fear of punishment in their client to gain payment of their fee?

Unfortunately the realities of criminal practice are that the fear of punishment and the loss of legal representation are major factors motivating clients to pay their fees. Were this practice illegal, it would place a defense counsel in an intolerable position, striving to collect his fee while studiously avoiding any mention of the seriousness of the crime, the possible punishments, the need for legal representation, his possible withdrawal if the fee was not forthcoming. Indeed, a motion to withdraw because of non-payment of fees could be seen as an attempt to extort. Surely there must be some limitation of the application of this general definition of extortion to criminal defense counsel or else there should be a frank warning to the criminal defense bar.

PRAYER

WHEREFORE, the above premises considered, the Amicus Curiae prays that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney of record for Amicus Curiae hereby certifies as follows:

(a) That I am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Motion for Leave to File Brief as Amicus Curiae and Brief of the National Association of Criminal Defense Lawyers, Inc., Amicus Curiae, in Support of the Petition for Certiorari, as hereinafter shown:

(b) That the names and addresses of the attorneys of record for the adverse party are as follows:

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Joseph Dolan
United States Attorney
Room C330

United States Courthouse
Drawer 3615
Denver, Colorado 80294

(c) That on this day I served three printed copies of the foregoing Motion for Leave to File Brief of Amicus Curiae and Brief of the National Association of Criminal Defense Lawyers, Inc., Amicus Curiae, in Support of the Petition for Certiorari on the said Wade H. McCree, Jr., and the said Joseph Dolan, attorneys for the said Respondent, by depositing same in the United States post office, with first class postage prepaid, properly addressed to said attorneys for Respondent at their said addresses.

Executed this ____ day of December, 1980.

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